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No. 591

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

NELSON-RYAN FLIGHT SERVICE, INC., *Petitioner*

v.

LORRAINE M. LANGE, individually and LORRAINE M. LANGE, *Trustee*

On Petition for Writ of Certiorari to the Supreme Court of Minnesota

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I.

THIS COURT DOES NOT SEARCH THE RECORD FOR A NON-FEDERAL GROUND ADEQUATE TO SUSTAIN THE JUDGMENT OF THE STATE COURT

Respondent's first point attempts a detailed review of the evidence in the case.[1] It is sufficient to note that

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[1] Whatever the Minnesota law on *res ipsa loquitur*, and however applied in this case (Cf. Resp. Br., p. 7), it is clear from the Minnesota court's opinion that it specifically rejected respondent's contention that the evidence, absent the federal regulation, per-

where, as here, the state court has decided a case, not on a state, but on a federal ground; this Court will not search the record to determine whether the decision of the state court might, consistently with the record, have been placed upon an independent adequate non-federal ground. *Grayson* v. *Harris*, 267 U.S. 352, 358; *Indiana ex rel. Anderson* v. *Brand*, 303 U.S. 95, 98.

II.

THE MINNESOTA COURT'S CONSTRUCTION OF THE FEDERAL REGULATION DOES NOT ACCORD WITH THE C.A.B. CONSTRUCTION OF ITS OWN REGULATION

The Petition cited decisions of the C.A.B. to establish, by the reasoning displayed therein, the plain administrative construction of the federal regulation by the Board charged with its enforcement.

Respondent's brief in its second point (pp. 11-15) merely demonstrates the obvious: If the stated ground of decision in an opinion may be ignored, it is fre-

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mitted an inference by the jury that the defendant's pilot-in-command had been negligent (Petition App., pp. 13a, 16a).

In relying on the state court's attempt to assimilate the responsibilities of a surgeon and a ship's master (Resp. Br., p. 11; Pet. App., p. 15a, notes 15, 16), respondent fails, as did the court, to distinguish between responsibility or "duty" which we concede and the "standard of care" exacted in determining whether the duty has been satisfied. See PROSSER ON TORTS (2nd ed.) p. 166. In the cases cited by the court, liability of the surgeon and ship's master was imposed on the doctrine of *respondeat superior*. But even where liability is imposed on the surgeon for his own negligence, it is only on evidence establishing *his* failure to exercise the requisite high degree of care in selecting, or supervising or relying upon, the nurse. In neither event is the nurse or the surgeon held as an insurer; the standard of care exacted is the high decree of care reasonable in such circumstances. PROSSER ON TORTS (2nd ed.) pp. 143-144, 188-189; 60 A.L.R. 147.

These cases, even if otherwise persuasive, find no analogy where, as here, liability to no third party is involved.

quently possible to reach the same result on theories foreign to those upon which the decision proceeds.

The C.A.B. decisions invoked by petitioner (Petition, pp. 16-20) disclose:

(1) Regulation § 60.2 making the pilot-in-command "responsible" is not applied by the C.A.B. as creating a presumption of negligence on evidence that the aircraft was operated in a negligent manner.

(2) The C.A.B. has uniformly applied the regulation to require proof of negligence by facts in evidence establishing that he failed to exercise the requisite highest degree of care under the standards of a reasonable prudent pilot in performing his own tasks in operating the aircraft and in supervising, or relying upon, the activities of others engaged in its operation.

(3) When examiners for the C.A.B. have, on occasion, on the same reasoning as that of the Minnesota court, attempted to hold pilots-in-command for negligence "imputed" to them because they are "responsible" the C.A.B. has summarily rejected the reasoning and theory (Petition for Certiorari, pp. 16-18).

III.

THE STATE COURT'S CONSTRUCTION OF THE FEDERAL REGULATION RAISES GRAVE DOUBT AS TO ITS CONSTITUTIONAL VALIDITY

Respondent's brief (Resp. Br., pp. 11-15) refuses even to recognize that the state court has construed and applied a federal regulation under federal law. It is equivocal but apparently contends that the state court has construed C.A.R. § 60.2 either (a) to impose a presumption of negligence conclusive against the pilot-in-

command except for the defense of "inevitable accident"; or (b) to create a *prima facie* presumption of negligence. Under either construction, as applied in this case, the federal regulation deprives petitioner of its right to due process of law.

(a) Construed to impose a conclusive presumption of negligence which the only defense is inevitable accident, the federal regulation violates the requirements of due process

Respondent's brief adheres to the lower court's language in maintaining that the pilot-in-command, to avoid liability, must show "extenuating circumstances" that "justify or excuse" (Resp. Br., pp. 12-13). This adds significance to the state court's reference to "Sudden illness" as an example of "extenuating circumstances" (Pet. App., p. 15a). The clear implication is that to the main fact of negligence thus arbitrarily presumed under the regulation, the pilot-in-command is precluded from presenting opposing evidence in support of any defense other than "inevitable accident". *Cohen* v. *Petty*, 62 App. D.C. 187, 188, 65 F. 2d 820, 821; *Moore* v. *Capital Transit Company*, 96 U.S. App. D.C. 335, 336, 226 F. 2d 57, 58 cert. denied, 350 U.S. 966.

So construed to bar any evidence, other than inevitable accident, to repel the fact of negligence so presumed, the regulation violates due process under both the Fifth and Fourteenth Amendments. *Mobile, J. & K.C. R.R.* v. *Turnipseed*, 219 U.S. 35, 43; *Bailey* v. *Alabama*, 219 U.S. 219, 239; *Western & Atlantic R. Co.* v. *Henderson*, 279 U.S. 639, 642; *Heiner* v. *Donnan*, 285 U.S. 312, 324-326, 329.

(b) Construed to create only a rebuttable presumption of negligence, the regulation as here applied denies due process

Even if the Minnesota court's decision may be read to hold, (as the respondent's brief may possibly be regarded as contending (Resp. Br., pp. 12-13)), that the federal regulation merely creates a prima facie presumption of negligence, the regulation so construed, as applied in this case, is invalid under the decisions of this Court.

Speculation or conjecture cannot supply the place of proof. *Galloway* v. *United States*, 319 U.S. 372, 395; *Moore* v. *Chesapeake & O. R. Co.*, 340 U.S. 573, 578. Here the state court concedes that there was no evidence that would permit an inference as to which of the two occupants of the plane was guilty of negligence (Petition App., pp. 13a, 16a) Where, as here there is no rational connection between the facts proved and the ultimate fact of negligence presumed, the statutory presumption violates the due process clauses of the Fifth and Fourteenth Amendments. *Manley* v. *Georgia*, 279 U.S. 1, 5-6; *Western & Atlantic R. R.* v. *Henderson*, 279 U.S. 639; *Tot* v. *United States*, 319 U.S. 463, 467-468, and cases cited.

CONCLUSION

The question presented on this petition involves no re-evaluation of evidence or its sufficiency.

This Court has only recently recognized that it has a duty to effectuate the controlling Congressional intention by granting certiorari in cases raising questions not merely evidentiary but going to the construction or scope of the federal regulation or statute. *Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500, 509; *Ferguson* v.

Moore-McCormack Lines, 352 U.S. 521, 532 (Frankfurter, J., dissenting). It is respectfully submitted, therefore, that certiorari should be granted in this case.

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